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COURT OF CRIMINAL APPEALS
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FILED
COURT OF CRIMINAL APPEALS
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In the Texas Court of Criminal Appeals

MARK DAVID ZIMMERMAN, Appellant,

v.

STATE OF TEXAS, Appellee.

On Petition for Discretionary Review from the
Fifth Court of Appeals in Dallas
COA No. 05-17-00492-CR
Tr. Ct. No. 067724

APPELLANT'S INITIAL BRIEF

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF THE CASE

In a four-count indictment, Appellant was charged with the offenses of possession with intent to deliver a controlled substance, namely gamma hydroxybutyric acid, in an amount of more than 400 grams (Count I); possession of marijuana in an amount of four ounces or more but less than five pounds (Count II); possession of a controlled substance, namely, methamphetamine, in an amount of less than one gram (Count III); and possession of a controlled substance, namely, tetrahydrocannabinol, in an amount of less than one gram (Count IV); each was alleged to have been committed in a drug free zone.[1] CR 66-67. Appellant filed a motion to suppress challenging the lack of reasonable suspicion to extend a routine traffic stop and employ the use of a drug dog. CR 24-25. The trial court denied Appellant's motion to suppress, and a jury trial was held. Ultimately, the jury found Appellant guilty of all four counts, found the enhancement paragraphs in the State's Notice of Enhancement "true," and assessed Appellant's punishment at ninety-nine (99) years of imprisonment with a $100,000 fine for Count I and fifteen years of imprisonment for Counts II, III, and IV, all ordered to run concurrently. 6 RR 76-77, 81.

[1] The original indictment was filed on December 14, 2017, contained five counts, and alleged that Appellant was a habitual offender. The amended indictment, cited above, struck one of the original counts and struck the habitual offender enhancement. *Compare* CR 12-13 *with* CR 66-67. The State filed a separate notice of enhancement on March 8, 2018. CR 37.

Appellant appealed his conviction to the Fifth Court of Appeals and challenged the trial court's denial of his motion to suppress on the basis that the arresting officer failed to have specific, articulable facts to prolong Appellant's traffic stop.[2] In an unpublished opinion, the appellate court cited to factors not supported by the arresting officer's testimony or videotape and affirmed the trial court's denial of Appellant's motion to suppress. *Zimmerman v. State*, No. 05-17-00492-CR (Tex. App.—Dallas Aug. 20, 2018), *available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=33ce8180-99d3-4f3f-ad3f-fdd8fc5dddfa&coa=coa05&DT=Opinion&MediaID=87928ca4-d56c-4942-8f1d-856890b7e990.

This Court granted Appellant's *Pro Se* Petition for Discretionary Review to determine whether the appellate court's ruling was error. Appellant's brief is timely if filed on or before August 14, 2019.

[2] Appellant's second issue pertaining to the imposition of restitution was sustained.

STATEMENT REGARDING ORAL ARGUMENT

Appellant originally requested oral argument in his petition for discretionary review, which was denied. Accordingly, Appellant does not request oral argument. However, in the event this Court later determines that oral argument would be helpful in resolving this case, undersigned counsel will present oral argument.

ISSUES PRESENTED

I. Did the court of appeals err by affirming the trial court's denial of Appellant's motion to suppress?

STATEMENT OF FACTS

A. Events Before the Dog Sniff

At the time of the hearing on Appellant's motion to suppress, Officer Cory Goodman had been a K-9 officer for the Whitesboro Police Department for two years.[3] 2 RR 6. Goodman testified that he was monitoring traffic on Highway 82 in Grayson County at approximately 10:20 p.m. on June 7, 2016 when he stopped Appellant's vehicle for a defective license plate light. 2 RR 8-9. Appellant pulled over and Goodman approached the driver's side door of Appellant's vehicle and asked him for his driver's license and insurance. State's Ex. 2. Appellant complied by providing his license and insurance, then inquired as to the reason for the stop. State's Ex. 2, 1:04.

When Goodman informed Appellant that he was stopped because he "had a tag light out," Appellant appeared surprised, and Goodman quickly responded, "I'm not going to give you a ticket for no tag light though, or anything like that." State's Ex. 2, 1:14. After a brief exchange, Goodman returned to his patrol car to run a driver's license and warrant check.

Goodman testified that Appellant's criminal history revealed "multiple possession, misdemeanor possession, and manufacture/delivery of controlled

[3] Goodman conducted the traffic stop of Appellant on June 7, 2016, and the suppression hearing was held on March 7, 2017. *Compare* CR 12 *with* 2 RR 1. Accordingly, Goodman had approximately one year of experience as a K-9 officer at the time of Appellant's arrest.

substance arrest[s].” 2 RR 12. Goodman testified, “I’m believing he’s transporting narcotics at ‘that point.’ He’s in some type of illegal activity.” 2 RR 12. He believed this because Appellant’s “story [was] not really adding up for a long-distance travel, and he avoided multiple questions as to his criminal history, answering not serious history, things along that nature.” 2 RR 12-13. However, video footage of the interaction Goodman had with Appellant up to “that point” did not involve “multiple questions” about Appellant’s criminal history or travel plans. Goodman had only one exchange with Appellant while completing the tasks of the traffic stop:

> Goodman: What brings you down to Texas?
>
> Appellant: Well, actually, I’m pretty much from Texas, grew up here, my brother is from here, I’m cutting out of here. I’m going on vacation.
>
> Goodman: Ah!
>
> Appellant: I broke up with this woman.
>
> Goodman: Hey, man, I don’t blame you there! Where are you going on vacay at?
>
> Appellant: Uh, I’m gonna visit some family in Colorado then actually go to Vegas.
>
> Goodman: Ah, very nice, very nice. Whereabouts are you staying at now?
>
> Appellant: Right now, I was just actually staying at Austin Ranch over there in the Colony.
>
> Goodman: Ok, All right, so, you’re heading to Colorado now?

> Appellant: Yeah.
>
> Goodman: I got you, I got you. You ever been in trouble with the law or anything?
>
> Appellant: Uh, Not quite in some time.
>
> Goodman: When was the last time?
>
> Appellant: Shoot, eight or nine years ago?
>
> Goodman: Nine, okay, what was that along the lines of, anything serious?
>
> Appellant: Ah, not too serious.
>
> Goodman: Not too serious?
>
> Appellant: Yeah.
>
> Goodman: Ok, alright. Who's car is this, your car? OK. Alrighty, well hang tight let me check everything out and I'll be right back.

State's Ex. 2, 1:17-2:20.

After receiving the results from dispatch, Goodman exited the patrol car with Appellant's license in his hand, briefly shined his light into the back of Appellant's vehicle and ordered Appellant to exit the vehicle "for a second." State's Ex. 2, 9:31-36. Before Appellant exited, Goodman asked whether he had any weapons, to which Appellant responded, "a paperweight," showed it to Goodman, who then identified it to be "knuckles." State's Ex. 2, 9:58-10:02. Appellant gave the "knuckles" to Goodman as instructed and exited the vehicle.

Once out of the vehicle, Goodman frisked Appellant and said, "I'm going to be honest with you, what I do here every night, I do drug interdiction. I saw you had a couple possessions of marijuana you had a manufacture/delivery. Nothing illegal inside that vehicle?" State's Ex. 2, 10:42-58. Appellant denied having anything illegal and upon Goodman's questioning again explained his connection with Texas and his travel plans. Goodman referenced a lack of luggage inside the vehicle, to which Appellant responded he had changes of clothes in a backpack. *See generally*, State's Ex. 2, 11:00-13:30.[4] After Appellant denied consent to search, Goodman retrieved his K-9, Ninja, to conduct an open-air sniff. State's Ex. 2, 13:34 ("Please stand right here, I don't need your consent to run the dog.").

B. Events After the Dog Sniff

Goodman testified that when he deployed Ninja to conduct the sniff, Ninja alerted to the driver's door and the "back, front passenger door." 2 RR 19-20. At the conclusion of the sniff, Goodman advised that the dog alerted on the vehicle, handcuffed Appellant, and advised that he was being "detained" while they searched the vehicle. State's Ex. 2, 17:36-56. More than once, Goodman asked Appellant

[4] During Appellant's exchange with Goodman, another officer is seen standing next to Appellant's vehicle, looking inside. As Goodman prepares the K-9, that officer Goodman that,

> back seat of the car there's a cooler in the center. It's unzipped. It looks like there's four bags, glassine bags, looks like marijuana, like . . . I could be mistaken because the crack is like this but that's what I got. . . .

State's Ex. 2, 13:58-14:15.

what he would find in the vehicle, and Appellant advised that there were weapons in the car and advised that he did not want to speak any more. Immediately after Appellant advised that he did not wish to speak anymore, Goodman placed him "under arrest" for the knuckles. State's Ex. 2, 19:32-56. During the hearing on Appellant's motion to suppress and at trial, Goodman was adamant that Appellant was not under arrest prior to initiating the dog sniff. 2 RR 33 (stating, "No, that is not true, No." in response to the Defense attorney's question: "But once you made the decision to ask Mr. Zimmerman to exit the vehicle, and he provided you the brass knuckles, the game was over, right? You were going to arrest him anyway so you could conduct a search of the vehicle?"); 5 RR 57 (advised that he placed Appellant under arrest prior to searching vehicle).

C. The Fruits of the Search

Upon searching Appellant's vehicle, the officers seized a .38 revolver, 7 mm rifle, marijuana, a glass pipe with methamphetamine residue, THC extract patches, a white brick substance, scales, glassine baggies, paraphernalia, a brown substance in a plastic container, approximately five hundred dollars in cash, and a Gatorade bottle with a clear substance that did not smell like Gatorade. 5 RR 55-60. The marijuana weighed 4.12 ounces, the white brick substance contained lidocaine, the glass pipe contained a net weight of .06 grams of methamphetamine, the THC patches contained a net weight of .75 grams of tetrahydrocannabinol, and the

Gatorade bottle contained a net weight of 452.01 grams of liquid containing "gamma hydroxybutyric acid, or 'GHB.'" 5 RR 65, 105-113.

D. The Jury's Findings and Punishment

Ultimately, the jury found Appellant guilty on all four counts, that each offense was committed within 1,000 feet of a drug free zone, and that Appellant was a habitual offender. CR 113-16. Specifically, the jury found Appellant had three prior felony convictions. The jury assessed his punishment at 99 years in prison and a $100,000 fine for Count I, and 15 years in prison and a $15,000 fine each for Counts II, III, and IV. The trial court ordered the sentences run concurrently. 6 RR 80-81.

SUMMARY OF THE ARGUMENT

The court of appeals erred by affirming the trial court's denial of Appellant's motion to suppress which was based on the Supreme Court's ruling in *Rodriguez v. United States*, 135 S. Ct. 1609, 191 L.Ed.2d 492 (2015). In *Rodriguez*, the Supreme Court held that a police officer's authority to detain an individual in the traffic stop context ends once the tasks tied to the traffic infraction are—or reasonably should have been—completed. *Id.* at 1614. It further held that the execution of a dog sniff was not part of an officer's traffic mission because it is aimed at detecting evidence of ordinary criminal wrongdoing. *Id.* at 1615. Thus, an officer has no authority to extend a traffic stop by executing a dog sniff unless he develops reasonable suspicion of additional criminal activity prior to completing the mission of the traffic stop. *See id.*at 1614; *see also United States v. Pack*, 612 F.3d 341, 350 (5th Cir. 2010); *Lerma v. State*, 543 S.W.3d 184, 191 (Tex. Crim. App. 2018).

Here, Officer Goodman unlawfully prolonged Appellant's detention by engaging in additional questioning and executing a dog sniff after the mission of the traffic stop was complete. By affirming the trial court's denial of Appellant's motion to suppress, the court of appeals failed to correctly apply the standard of review and reversibly erred. Reversal is required.

ARGUMENT

I. Did the court of appeals err by affirming the trial court's denial of Appellant's motion to suppress?

A. The Standard of Review

When a trial court's ruling on a motion to suppress is challenged on appeal, the appellate court is required to afford almost total deference to the trial court's determination of historical facts, and of application of law to fact issues that turn on credibility and demeanor, while reviewing *de novo* other application of law to fact issues. *State v. Ford*, 537 S.W.3d 19, 23 (Tex. Crim. App. 2017). In situations where the trial judge makes no findings of historical facts, the appellate court will infer factual findings implicit in the trial court's conclusions as long as the implied findings are supported by the record. *Hereford v. State*, 339 S.W.3d 111, 118 (Tex. Crim. App. 2011). In determining whether the evidence supports a trial court's implicit findings, the appellate court must take all of the evidence, including video evidence, into account. *See Tucker v. State*, 369 S.W.3d 179, 185 (Tex. Crim. App. 2012).

When an appellate court reviews pure questions of law and mixed questions of law and fact that do not depend on credibility determinations, the appellate court's review is *de novo* to ensure the appellate court's ability to "maintain control of and to clarify the legal principles." *See Hereford*, 339 S.W.3d at 118 (citing *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997); *State v. Dixon*, 206 S.W.3d 587,

590 (Tex. Crim. App. 2006)); *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000) (application of 4th Amendment standards reviewed *de novo*); *see also Ramirez-Tamayo v. State*, 537 S.W.3d 29, 35-36 (Tex. Crim. App. 2017) (when no findings entered, reviewing court assumes trial court made implicit findings to support ruling if record supports such findings); *Lerma v. State*, 543 S.W.3d 184, 190 (Tex. Crim. App. 2018) (same). Whether the facts known to the officer at the time of the detention amount to reasonable suspicion is a mixed question of law that is reviewed *de novo* on appeal. *State v. Kerwick*, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013).

B. Reasonable Suspicion, Traffic Stops, and Prolonged Detentions

Under the Fourth Amendment, a warrantless detention of a person that amounts to less than a full-blown custodial arrest must be justified by reasonable suspicion. *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011). A police officer has reasonable suspicion to detain if he has "specific, articulable facts" that, combined with rational inferences from those facts, would lead him reasonably to conclude that the person detained is, has been, or soon will be engaged in criminal activity. *Id.* These facts must amount to more than a mere hunch or suspicion. *Davis v. State*, 947 S.W.2d, 244 (Tex. Crim. App. 1997). As a result, the articulable facts must create some reasonable suspicion that some activity out of the ordinary is

occurring or has occurred, some suggestion to connect the detainee with the usual activity, and some indication the unusual activity is related to crime. *Id.*

This protection extends to routine traffic stops, which are analogous to a "*Terry* stop" because a police officer's investigation for a traffic violation is a "relatively brief encounter." *See United States v. Rodriguez*, 135 S. Ct. 1609, 1614 (2015); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion"). The tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission" which is to address the traffic violation that warranted the stop and attend to related safety concerns. *Rodriguez*, 135 S. Ct. at 1614.

A traffic stop may not be prolonged beyond the time to complete the tasks associated with the stop. *Lerma*, 543 S.W.3d at 190. This is because addressing the infraction is the purpose of the stop, and the police officer's authority for the stop ends when the tasks tied to the traffic infraction are—or reasonably should have been—completed. *See Rodriguez*, 135 S. Ct. at 1614 (citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). Thus, a lawful traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete [the] mission of issuing a warning ticket." *Caballes*, 543 U.S. at 407; *see also United States v. Pack*, 612 F.3d 341, 350 (5th Cir. 2010) ("An officer's subsequent actions are not reasonably

related in scope to the circumstances that caused him to stop the vehicle if he detains its occupants beyond the time needed to investigate the circumstances that caused the stop, unless he develops reasonable suspicion of additional criminal activity in the meantime.").

Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to the traffic stop, which typically include checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. *Rodriguez*, 135 S. Ct. at 1615. Once the computer check is complete, and the officer knows that the driver has a valid license, no outstanding warrants, and the car is not stolen, the traffic stop investigation is fully resolved. *Lerma*, 543 S.W.3d at 190; *Kothe v. State*, 152 S.W.3d 54, 64 (Tex. Crim. App. 2004).

An investigation into other crimes is not part of a traffic stop's mission, just as a dog sniff is not a part of an officer's traffic mission. *See Rodriguez*, 135 S. Ct. at 1615. This is because a dog sniff is aimed at detecting evidence of ordinary criminal wrongdoing. *Id.*; *Medina v. State*, 565 S.W.3d 868, 876 (Tex. App.—Houston 2018, pet. ref'd). As a result, an officer's traffic stop must end once his mission is complete unless the officer has reasonable suspicion that the driver is involved in criminal activity. *See Lerma*, 543 S.W.3d at 191; *Kothe*, 152 S.W.3d at 64. A traffic stop may not be used as a "fishing expedition for unrelated criminal

activity." *Davis*, 947 S.W.2d at 243 (quoting *Ohio v. Robinette*, 519 U.S. 33, 41 (1996) (Ginsberg, J., concurring)).

But a fishing expedition is exactly what Officer Goodman did.

C. Discussion

While State's Exhibit 2 is inconclusive as to whether Appellant's license plate light was actually defective, the appropriate standard of review requires this Court to infer that the trial court found Goodman's testimony that he observed a defective driver's license plate light on Appellant's vehicle sufficient to justify the stop. *See Hereford*, 339 S.W.3d at 118; *see also United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005) ("For a traffic stop to be justified at its inception, an officer must have an objectively reasonable suspicion that some sort of illegal activity, such as a traffic violation, occurred, or is about to occur, before stopping the vehicle."). Accordingly, the issue in this appeal is whether Goodman had specific, articulable facts to prolong Appellant's detention after the mission of the traffic stop was complete. He did not.

i. <u>Goodman did not have specific, articulable facts to prolong Appellant's detention beyond the mission of the traffic stop.</u>

Authority for a seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. *Rodriguez*, 135 S. Ct. at 1614. This means that "once the reason for the stop has been satisfied, the stop may not be used as a 'fishing expedition for unrelated criminal activity.'" *Davis*, 947 S.W.2d at 243

(quoting *Ohio v. Robinette*, 136 L. Ed. 2d 347, 117 S. Ct. 417 422 (1996) (Ginsberg, J., concurring).

Goodman testified that a traffic stop ends "after I check the driver's license, vehicle insurance, driver's history, warrant history, whatnot." 2 RR 38. Because Goodman was not going to issue a ticket "or anything like that," his authority to detain Appellant for the defective license plate light ended once all of the checks from dispatch were complete. *See* State's Ex. 2, at 1:07; *Rodriguez*, 135 S. Ct. at 1614 (authority for traffic stop ends when tasks tied to infraction complete).

In *Rodriguez*, the arresting officer explained that he had "gotten the mission of the traffic stop 'out of the way,'" i.e., accomplished, when he sought permission to walk a drug dog around the defendant's vehicle. *Rodriguez*, 135 S. Ct. at 1613. When Rodriguez denied consent, the officer ordered him to exit the vehicle, and thereafter, conducted a dog sniff. *Id.* As in *Rodriguez*, the purpose of Goodman's traffic stop was accomplished when dispatch reported that Appellant had no outstanding warrants and had a valid driver's license. And just as in *Rodriguez*, Goodman prolonged the detention by ordering Appellant to exit the vehicle, requested consent to search the vehicle, and upon being denied, conducted the dog sniff. *See id.*

By having Appellant exit the vehicle, answer additional questions on the side of the road, and conducting the dog sniff without Appellant's consent, Goodman

unduly prolonged Appellant's detention beyond the mission of the traffic stop. *See id.* at 1615. Goodman's conduct was more akin to a "fishing expedition," which this court expressly disavowed in *Davis v. State*, 947 S.W.2d 240 (Tex. Crim. App. 1997).

In *Davis*, the defendant was stopped for suspicion of driving while intoxicated, which was quickly dispelled, as was the case with Appellant. *Davis*, 947 S.W.2d at 245. Like Appellant, Davis had no outstanding warrants and a valid driver's license. *Id.* The only reason for Davis's continued detention was the officer's explanation that he "did not appear to be someone who was on a business trip," but offered no facts to support his explanation. *Id.*

As in *Davis*, Appellant was not under the influence of any substances, nothing of an illegal nature was in plain view, and no odors of marijuana or anything else of a criminal nature were present. *Id.*; 2 RR 26. Moreover, Goodman testified that Appellant operated his vehicle in response to the traffic stop appropriately, Appellant made appropriate eye contact, and was not overly nervous. 2 RR 23-26. As in *Davis*, Goodman's basis for the prolonged detention was similarly vague by explaining that Appellant's story didn't "add up" because he only saw a small bag (but admittedly didn't even look in the back of the vehicle as set forth *infra*), and avoided multiple questions about his criminal history (which was contradicted by State's Exhibit 2).

Moreover, Goodman did not know whether the felony offenses relayed by dispatch were convictions or arrests. In *United States v. Powell*, the Fifth Circuit held that, in most instances, a prior criminal record is not, standing alone, sufficient to create reasonable suspicion. *United States v. Powell*, 666 F.3d 180, 188 (5th Cir. 2011). It explained the basis of the rule as follows:

> If the law were otherwise, any person with any sort of criminal record—or even worse, a person with arrests but no convictions—could be subjected to [an] investigative stop by a law enforcement officer at any time without the need for any other justification at all. To find reasonable suspicion in this case could violate a basic precept that law enforcement officers not disturb a free person's liberty solely because of a criminal record. Under the Fourth Amendment our society does not allow police officers to "round up the usual suspects."

Id. (citing *United States v. Laughrin*, 438 F.3d 1245, 1247 (10th Cir. 2006). The Fifth Circuit further held, "[A] false statement, without more, will typically be insufficient" to establish reasonable suspicion. *Id.* at 188-89.

Applying these principles in *Powell*, the Fifth Circuit held that a defendant's priors for an offense with no detail concerning the date of their occurrence or whether they involved convictions, when viewed in light of a defendant's purported misrepresentation ("the suspiciousness of which is arguable"), strongly militated against a finding of reasonable suspicion warranting a detention. *Id.* at 1889. Because Goodman had no more articulable facts than the officers in *Powell*, there was no reasonable suspicion to justify Appellant's continued detention.

ii. The appellate court did not apply the standard of review properly.

The court of appeals properly concluded that the purpose of Goodman's traffic stop was complete when Goodman learned that Appellant's driver's license and insurance information were valid, the vehicle was properly registered, and Appellant had no outstanding warrants. *Zimmerman*, slip op. at 11. However, the court's ultimate conclusion is wrong because it incorrectly applied the standard of review.

Specifically, the court of appeals cited factors that had nothing to do with Goodman's reason for prolonging the detention. First, the court opined that Appellant's traveling "late at night" was a contributing factor supporting reasonable suspicion. *Id.* at 13. But Goodman never referenced the time of day as a contributing factor. In fact, the record suggests otherwise. The stop took place just before 10:30 p.m. (2 RR 32), and the highway where Appellant was stopped commonly had a significant amount of night-time traffic. *See* 5 RR 42 ("Being that it is a US Highway, it is traveled pretty heavily *even at that time of night*.") (emphasis added).

Second, the court cited Appellant's demeanor "as shown by the videotape," as a contributing factor. Again, Goodman never cited Appellant's demeanor as contributing to his detention. To the contrary, Goodman testified that Appellant made appropriate eye contact, did not appear "too extremely nervous," and did not appear to be under the influence of any drugs or alcohol. 2 RR 25-26. His description is consistent with Appellant's portrayal in State's Exhibit 2. By citing Appellant's

demeanor "as shown by the videotape," the appellate court blinded itself from Goodman's own testimony and replaced it with what it believed it *should have contained* in order to affirm the trial court's decision. *See, e.g. Kerwick*, 393 S.W.3d at 274 (reversing appellate court because its review and ultimate conclusion centered on what it believed judicial findings "should have contained" and holding that de novo was proper standard for application of law to facts); *Carmouche*, 10 S.W.3d at 332 ("[W]e cannot blind ourselves to the videotape evidence simply because [the officer's] testimony may, by itself, be read to support the Court of Appeals' holding.").

Third, the court cited Goodman's seeing only a "very small bag" for a long-distance trip as the final factor to support Goodman's conclusion that he had reasonable suspicion to order Appellant out of the vehicle. *Zimmerman*, slip. op. at 13. Indeed, Goodman testified that he only saw a small bag in the floorboard of the vehicle (2 RR 12), but he also did not look inside the vehicle "very hard," if at all, prior to receiving the criminal history results from dispatch. State's Ex. 2, 4:45 ("I didn't see any luggage in the car. Nothin.' I didn't look in the very back too hard though. There might be something back there.").[5]

[5] While the video showed Goodman briefly shine his flashlight into the back of the vehicle as he approached Appellant the second time (State's Ex. 2, 9:36), it was not empty. A large garbage bag full of clothes (consistent with someone moving out of an ex-partner's home in a rush) was in the back area of the vehicle. *See* State's Ex. 2, 25:25.

Lastly, the court of appeals relied on Appellant's statement that he had clothes for his trip in a backpack as support for Goodman's assertion that no luggage was inside the vehicle. *Zimmerman*, slip op. at 5. However, Appellant made this statement *after* the mission of the traffic stop was complete. In *Duran v. State*, this Court held that information "acquired or noticed after a detention or arrest cannot be considered" where specific and articulable facts are "critical." *Duran v. State*, 397 S.W.3d 563, 569 (Tex. Crim. App. 2013). By pointing to statements Appellant made well after Goodman decided to prolong the detention, the court of appeals improperly considered information acquired after Goodman improperly decided to prolong the traffic stop. *See id.* at 570 ("post-hoc" rationalization for detention cannot be based on information learned after the detention).

Because the appellate court's decision was geared so heavily towards affirming the trial court's ruling, it failed to review the trial court's application of search and seizure law *de novo* and accordingly reached the wrong result. *See Tucker*, 369 S.W.3d at 185 (appellate court must take all evidence into account); *Carmouche*, 10 S.W.3d at 332 (court may not blind itself to evidence or lack thereof in order to support ruling).

iii. <u>The brass knuckles discovery did not attenuate any taint.</u>

After ordering Appellant to exit the vehicle, Goodman learned that Appellant had brass knuckles in his pocket. But this "revelation" is immaterial because it was

learned after Goodman completed the traffic stop's mission, and therefore, cannot be considered in the reasonable suspicion analysis. *See Duran*, 397 S.W.3d 569-70.

In *St. George v. State*, the State argued that a passenger-defendant's misidentification, when coupled with his nervous demeanor established reasonable suspicion of Failure to Identify. *Id*. However, the officers did not learn the passenger-defendant gave an incorrect name until *after* the traffic stop was complete. Accordingly, this Court held that the officers' prolonged detention was unlawful because they had no specific articulable facts to justify the continued detention after the traffic citation was issued. *See id.* at 726.

Like the officer in *St. George*, Goodman did not learn about the brass knuckles until after the mission of the traffic stop was complete. Thus, the knuckles could not be applied to the reasonable suspicion analysis. Lastly, the subsequent dog sniff was not justified as a search incident to arrest or an inventory search because Goodman did not arrest Appellant for the knuckles until after the dog sniff was complete, and was adamant that an arrest did not occur before initiating the dog sniff.

D. Conclusion

Goodman learned of no specific, articulable facts to believe Appellant had recently been, was, or soon would be engaging in criminal activity, he had no authority to prolong Appellant's detention. Because an inarticulate hunch does not establish reasonable suspicion, Goodman's continued detention was unlawful and

violated the Fourth Amendment's protections against unreasonable searches and seizures as enunciated by *Rodriguez v. United States*.

PRAYER

For the reasons set forth above, Appellant prays this Court will **SUSTAIN** his sole issue in this appeal, **REVERSE** the lower court's judgment in whole and **REMAND** the case so that the charges arising out of Appellant's unconstitutional detention may be dismissed.

Respectfully submitted,

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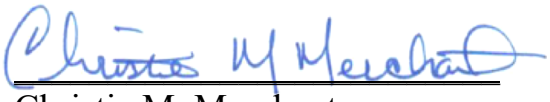
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Appellant's Brief has been forwarded to the Grayson County District Attorney's Office and Office of the State Prosecuting Attorney on August 14, 2019 via EfileAndServe.



Christie M. Merchant

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limitations because it is computer-generated and does not exceed 15,000 words. Using the word-count feature on Microsoft Word, the undersigned certifies that this document contains 5,643 words in the entire document. This document also complies with the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font.

Christie M. Merchant